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No. ____

In the Supreme Court of the United States

JOHN C. LAUTERMILCH,

Petitioner,

v.

FINDLAY CITY SCHOOLS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether, construing evidence most favorably to Petitioner, in a case involving a claim by a male substitute teacher that he was denied equal protection of the law when he was *de facto* terminated, the Petitioner teacher's demonstration that the decision maker stated that he was "too macho" during his termination meeting was direct evidence sufficient to shift the burden of persuasion to Respondent to show that it would have terminated Petitioner absent the discriminatory motive.

2. Whether Petitioner's out of classroom comment on school property to a student, construed most favorably to Petitioner, establishing that Petitioner borrowed a famous quotation from the temperance movement to the effect that "lips that touch liquor shall not touch mine," was instructive and a matter of public concern such as to trigger First Amendment protection under 42 U.S.C. Section 1983.

PARTIES TO THE PROCEEDING

John C. Lautermilch, Petitioner and Plaintiff-Appellant below, is an individual resident of the City of Findlay, County of Hancock, State of Ohio and was formerly employed by Respondent.

Respondent, Defendant-Appellee below, Findlay City Schools, is a City School system operating under Ohio law. Respondent is located in Hancock County, Ohio where Petitioner was employed. There are no parent companies and no subsidiary corporations of Respondent.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 3, 2003. This decision was recommended for full text publication by the Sixth Circuit and is published at 314 F.3d 271 (6th Cir. 2003). This decision is attached hereto as Appendix B. This decision was accompanied by a Judgment Order filed on January 3, 2003. This Judgment is attached as Appendix C. On January 15, 2003, Petitioner timely filed a Petition for Rehearing with suggestion for rehearing en banc before the United States Court of Appeals for the Sixth Circuit. In its order filed on February 21, 2003, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing. The Petition for Rehearing was submitted to the original panel. This order is unpublished and is attached as Appendix A. The Order of the Northern District of Ohio, Western Division (per Judge James G. Carr) granting Respondent's Motion for Summary Judgment in all respects was entered April 9, 2001 and is unpublished. See Appendix D. This Order was accompanied by a Judgment Entry also entered by the District Court on April 9, 2001. The Judgment Entry is also unpublished and is attached hereto as Appendix E.

STATEMENT OF JURISDICTION

The jurisdictional basis for federal jurisdiction in the Court of first instance was pursuant to 42 U.S.C. §1983. In his original Complaint in the District Court, jurisdiction was

invoked pursuant to 28 U.S.C. §1331. Moreover, supplemental claims under Ohio statutory and common law were included in the Complaint but were dismissed without prejudice by the District Court and are not at issue at the present time. The jurisdictional basis of the State law claims was the District Court's supplemental jurisdiction under 28 U.S.C. §1367. Petitioner invoked the jurisdiction of the United States Court of Appeals for the Sixth Circuit pursuant to 29 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

The Statute involved, 42 U.S.C. §1983 is set forth in Appendix F.

STATEMENT OF THE CASE

Statement of Facts

Petitioner was employed as a substitute teacher with the Findlay, Ohio City School District commencing in February of 1996. Starting in 1997, Petitioner began to work as a Substitute exclusively at the Findlay High School which was his preference. In the Respondent District, there was a different method for assigning substitute teachers in the high schools. A secretary in Central Administration assigned teachers to work in the middle schools, whereas the high school was responsible for its own assigning of substitutes. Petitioner contends that he was promised by one of the District's administrators that he would be called for teaching. Petitioner's claims in this case arise from the Respondent's refusal to call him for substitute teaching after November of 1998. The Respondent contends that its reasons for removing Petitioner from consideration for substitute teaching

assignments in November of 1998 arose from a report of a student to the effect that Petitioner had made an inappropriate comment. Respondent then proceeded to cite other alleged past incidents all of which Petitioner denied and none of which were ever dealt with on a contemporaneous basis. The alleged statement giving rise to the November 1998 meeting and removal was a statement attributed to him by a student to the effect that "Lips who (sic) touch alcohol may not touch mine, but that does not rule out other parts of my body." Petitioner testified that this was a quote from Carrie Nation, the temperance leader in the late 1800s or early 1900s. With respect to this comment, Petitioner explained that he had quoted the first part of the phrase, but denied the last phrase "but that does not rule out other parts of my body." Petitioner contended that this was a comment he made when students asked him if he drank and such.

On November 17, 1998, Petitioner received a tape recorded voice mail message from an Assistant Principal who was in charge of assigning substitutes at the high school. This message advised Petitioner that he was not needed that morning and that Petitioner, the Assistant Principal and the Principal needed to set up a meeting and discuss a few things before Petitioner could be sent back into the building. This meeting was held on November 20, 1998. Petitioner was informed at this meeting by the Principal that senior girls had complained that he was telling dirty jokes and talking about sex all the time. The Principal, a female, further informed Petitioner that she had been hearing about this stuff for two years and the Petitioner was "too macho." Petitioner testified that at the meeting he repeatedly asked for examples and denied the allegations. Once the Principal brought out the "lips that touch liquor" quote, Petitioner denied the vulgar end phrase of it and explained the context. Petitioner testified that the end result of the November 20, 1998 meeting was that

the Principal would look into the situation and that it would take some time, but that Petitioner would hear back from her by the end of November. Petitioner never heard back and was never called to teach again.

Petitioner emphasized in his deposition testimony that the Principal gave him no examples of past problems in the November 20, 1998 meeting. Petitioner also advised the Principal that she should look into his accusers because he had some disciplinary issues with some of the students. Petitioner testified that he never received a call back from Respondent. Petitioner also denied that he was advised that if he disagreed with the Principal's decision he could discuss the situation with the Assistant Superintendent.

The Assistant Principal in charge of the substitute teachers at the high school testified that he had not even talked to Petitioner about any of the alleged incidents of impropriety before going to see the Principal. Moreover, this Assistant Principal was unsure if there was a school policy for reporting harassment by students and admitted that he, personally, had never talked to the reporting student or any other witnesses and that another Assistant Principal had conducted the full investigation. Nothing was given in writing to advise Petitioner at any point what charges were brought against him.

The Principal testified that an Assistant Principal first came to her with the allegations but admitted that she did not talk with the student and did not independently investigate anything pertaining to Petitioner. Significantly, the Principal stated that she had decided in advance that she did not want the Petitioner as a substitute teacher anymore. The Principal herself testified that she proceeded to set up the November 20, 1998 meeting with Petitioner, but gave him nothing in writing

and never talked to Petitioner about other supposed rumors which she claimed formed the basis of her concerns. The Principal, here the decision maker, admitted that she may have said that Petitioner was too macho.

The actual report giving rise to the November 20, 1998 meeting appears to have been taken by an Assistant Principal at the Findlay High School who was in charge of ninth grade students. This Assistant Principal testified that she received a written complaint from a student in November of 1998 and that she further investigated the incident by talking to two additional students. One student corroborated the story and the other student stated that he did not remember and did not want to be involved. The reporting Assistant Principal stated that she reported the incident to the Assistant Principal in charge of substitute teachers, but admitted that she had had no further meetings with administration and did not discuss the incident with Petitioner. Nor was the reporting Assistant Principal called in to any investigation of this incident during the remainder of the 1998-1999 school year.

The applicable Anti-Harassment Policy was in effect at the time. Nothing in the record shows that a formal harassment complaint was ever filed. Respondent's policy states on its face that if not formally resolved, complaints of harassment may be reduced to writing and filed with the superintendent and will be investigated by the superintendent or the superintendent's designee. Respondent's policy also ensures that in making determinations under the policy that the totality of relevant circumstances will be considered on a case by case basis.

Description of Proceedings Below

The District Court disposed of this case on the employer's Motion for Summary Judgment. The District Court found that Petitioner as a substitute teacher in Ohio was an "at will" employee and that he could be terminated with or without cause. The District Court then reasoned that Plaintiff failed to establish that he has a protectable property interest and that due process rights did not attach under 42 U.S.C. Section 1983. The District Court next held that Petitioner's interaction with students outside the classroom was not a matter of public concern and that Petitioner did not present a valid claim for violation of freedom of association pursuant to 42 U.S.C. Section 1983. The District Court then turned to Petitioner's alleged statement pertaining to the lips that touch liquor quote from Carrie Nation. The District Court found that Petitioner's comments did not speak to matters of public concern and that, therefore, Petitioner's statements did not fall within the protection of the First Amendment. The District Court then analyzed Petitioner's equal protection claim based on reverse gender discrimination. The District Court opined that Petitioner had not shown any direct evidence of reverse gender discrimination and proceeded to analyze the claim under the *McDonnell-Douglas* burden shifting approach to circumstantial evidence. Here, the District Court reasoned that Petitioner had failed to offer any evidence : 1) that he was replaced by someone outside his protected class; 2) that defendant has no articulated legitimate, and non-discriminatory reason for terminating plaintiff; or 3) that defendant's articulated reasons are merely a pretext for discrimination. As to the "too macho" comment made by the female Principal at the time of the termination meeting on November 20, 1998, the District Court reasoned that an isolated comment that plaintiff was "too macho" is not a sufficient basis for attributing discriminatory animus to the

defendant. The District Court granted Respondent summary judgment on Petitioner's federal law claim and dismissed remaining state law claims which had been brought pursuant to the District Court's supplemental jurisdiction without prejudice.(Appendix D, p. 14).

Mr. Lautermilch appealed to the United States Court of Appeals for the Sixth Circuit. There, he presented three basic arguments. Firstly, Petitioner contended that the District Court erred in finding that he failed to demonstrate a property interest that was protectable under 42 U.S.C. Section 1983. Secondly, Appellant contended that the District Court erred in finding that he did not make a sufficient showing of sex discrimination such that would entitle him to protection as a violation of a liberty interest under 42. U.S.C. Section 1983. Petitioner also contended that he had made a sufficient showing of an equal protection violation on the basis of gender. Thirdly, Petitioner contended that the District Court erred in finding that his claims of deprivation of First Amendment rights did not involve matters of public concern or were otherwise not protected forms of speech or association. In a 2-1 Opinion filed on January 3, 2003 the United States Court of Appeals for the Sixth Circuit affirmed the decision of the District Court (Appendix B). Judge Moore authored a dissenting opinion.

The majority opinion of the Sixth Circuit panel noted that the District Court had correctly found that Petitioner had not identified sufficient facts and circumstances from which a reasonable jury could find that he was anything other than an "at will" employee and that he was devoid of a property interest which would be protectable under 42 U.S.C. Section 1983. The majority panel also agreed with the District Court that Petitioner's First Amendment Claims failed because none of Petitioner's speech addressed a matter of public concern.

With respect to Petitioner's Equal Protection Sex Discrimination Claim, the majority panel agreed with the District Court that because Mr. Lautermilch had not provided any evidence that he was replaced by someone outside his protected class, he had failed to establish a *prima facie* case under the four prongs of *McDonnell Douglas*. The majority panel then noted that Petitioner attempted to establish his *prima facie* sex discrimination case through direct evidence of discrimination. The majority panel noted that Petitioner attempted to hang his entire *prima facie* case on one offhand comment by the Principal that he was "too macho). The majority then opined that the evidence did not require the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions and, therefore, Petitioner had not established a *prima facie* case. The majority went on to add that when the "too macho" comment was placed in the context of the termination hearing documenting specific allegations of misconduct, any reasonable trier of fact would conclude that the comment was critical of Mr. Lautermilch's behavior, not his sex or gender. The majority then noted that even if Petitioner had established a *prima facie* case of sex discrimination, the Respondent would be entitled to summary judgment, noting that the Respondent had articulated a legitimate nondiscriminatory reason for Petitioner's discharge, and Petitioner had not provided any significant evidence that the stated reasons for his termination were pretextual.

On January 15, 2003, Petitioner timely filed a Petition for Rehearing with Suggestion for Rehearing *En Banc*. Petitioner contended that the panel's majority decision was erroneous in that Petitioner had brought forth credible direct evidence of sex discrimination. Petitioner contended that when a plaintiff comes forward with credible direct evidence of gender discrimination, the burden of persuasion shifts to

the defendant to show that it would have terminated the plaintiff absent the discriminatory motive. Petitioner contended that the panel's majority decision was at odds with precedent in the Sixth Circuit and with precedent of this Court.

In an order filed February 21, 2003, the Sixth Circuit noted that no judge of the court requested a vote on the suggestion for rehearing *en banc* and the petition for rehearing was referred back to the original panel which denied the Petition. See Appendix A.

This case presents several questions. Petitioner contends that the Sixth Circuit has applied the wrong analysis to Petitioner's sex discrimination claim. Petitioner contends that the "too macho" comment was uttered by the Principal who was the decision maker at the time of the termination hearing. Petitioner contends that this was more than one mere offhand comment. Accordingly, it was error for the Sixth Circuit to apply the *McDonnell-Douglas* burden shifting analysis to defeat his claim. Thus, the question is presented as to the nature of evidence required to trigger the Court to shift the burden on the basis of direct evidence. Moreover, if Petitioner is correct is his contention that the "too macho" comment made by the decision maker at the time of the termination hearing was enough qualify as direct evidence of discrimination, did the Sixth Circuit err in concluding that the Respondent would be entitled to summary judgment nonetheless because Respondent articulated a legitimate nondiscriminatory reason for Petitioner's discharge and Petitioner has not provided any significant evidence that the stated reasons for his termination were pretextual. The question thus presents itself as to whether, in the instance in which credible direct evidence is present by a plaintiff, the burden of persuasion properly shifts to the defendant to show

it would have terminated the plaintiff absent the discriminatory motive and whether the Sixth Circuit's application of the *McDonnell Douglas* methodology of legitimate non discriminatory reason/pretext was erroneous.

Finally, the majority panel of the Sixth Circuit sweepingly concluded that Petitioner' speech was not a matter of public concern. Petitioner contends that a question is presented regarding whether comments made by a school teacher in an instructing manner on school premises and the influence on the public and public schools inherently implicate matters of public concern.

REASONS FOR GRANTING THE WRIT

Equal Protection Claim-reverse gender based discrimination

Petitioner, as noted, *supra*, contends that the requirements for granting a motion for summary judgment have not been met with respect to Petitioner's reverse gender discrimination equal protection claim.

The majority panel of the Sixth Circuit dismissed the "too macho" comment uttered by the Principal in support of Petitioner's termination as just one isolated offhand comment. In this case, the "too macho" comment was uttered by the decision maker at the actual termination meeting of November 20, 1998. Under the Title VII analysis, which is applicable to 42 U.S.C. Section 1983 equal protection claims, direct evidence of gender based animus can create a *prima facie* case. *See Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825 (6th Cir. 2000). It is submitted that there is no ambiguity in the meaning of the remark and that the Sixth Circuit's determination that any reasonable trier of fact would

conclude that the comment was critical of Petitioner's behavior, not his sex and gender, is contrary not only to Title VII law on the issue of direct evidence but also contrary to this Court's clear pronouncements that on summary judgment, Courts should not weigh evidence but construe evidence most strongly in favor of the non-moving party. The Sixth Circuit itself, in past decisions, has, of course, recognized that in *Logan v. Denny's, Inc.*, 259 F.3d 558 (6th Cir. 2001). There the Sixth Circuit itself recognized the requirement that when deciding a motion for summary judgment, the evidence–all of the evidence–be viewed in the light most favorable to the nonmoving party. In *Reeves v. Sanderson Plumbing Products, Inc.*, 500 U.S. 133 (2000), an age discrimination case which involved a Rule 50 motion, this Court noted that in the analogous context of summary judgment under Rule 56, it has stated in past decisions that the court must review the record taken as a whole. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). In reviewing all of the evidence in the record, this Court observed that the reviewing court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554-555 (1990); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, n. 6 (1962). This Court has stated that credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

In light of this Court's decision in *Reeves*, other circuits have carefully considered application of the stray remark doctrine. *Russell v. McKinney Hospital Venture*, 235 F.3d 219 (5th Cir. 2000); *Hunt v. City of Markham, Ill.*, 219 F.3d 649, 652-653 (7th Cir. 2000). Recently, in *Fakete v.*

Aetna, Inc., 308 F.3d 335 (3d Cir. 2002), the Third Circuit, in an age discrimination action, reversed a District Court which had concluded, without analysis, that a single statement by a decision maker to the effect that the Petitioner wouldn't be happy and that the decision maker was looking for younger single people was a stray remark that did not directly reflect the decision making process of any particular employment decision.

Petitioner contends, then, that the "too macho" comment uttered by the Principal constituted direct credible evidence of gender discrimination. The burden of persuasion should properly have shifted to the defendant to show it would have terminated Petitioner absent the discriminatory motive. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*, 176 F.3d 921, 926 (6th Cir. 1999). As noted by Sixth Circuit Judge Karen Nelson Moore in her dissenting opinion, the commonplace usage of the word "macho" refers exclusively to behaviors or qualities associated with the male gender. Both the nature of the comment and the manner in which it was delivered suggest that summary judgment was erroneous, as a reasonable juror could find by a preponderance of evidence that the Petitioner's gender was at least a motivating factor in Respondent's actions. *Laderach*, 207 F.3d 829. Stereotypes similar to those in this case were considered as direct evidence of gender discrimination by this Court in *Price Waterhouse v. Hopkins*, 490 U.S.235 (1989). See also *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3rd Cir. 1999); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

Since Petitioner has come forward with direct evidence of gender discrimination, the Respondent should have been allocated the burden of persuasion to show that it would have terminated the Petitioner absent the discriminatory motive.

Jacklyn, 176 F.3d at 926. Questions of fact therefore remain regarding what actually motivated the Principal to terminate Petitioner. Moreover, in *Weberg v. Franks*, 229 F.3d 514, 526 (6th Cir. 2000), the Sixth Circuit held that racially discriminatory statements that serve as direct evidence of discrimination create genuine issues of material fact.

The decision of Sixth Circuit conflicts with this Court's decision in *Trans World Airlines, Inc. v. Thurston*, 469 U.S.111 (1985). In that decision, this Court held that the *McDonnell Douglas/Burdine* analysis does not apply where plaintiff presents direct evidence of discrimination. The decision of the Sixth Circuit is also in conflict with this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S.228 (1989). In that case, a female employee was permitted to prove that her gender played a part in an adverse employment decision through statements which included one that was too "macho."

As a result of the decision of the Sixth Circuit in this case, there is inconsistency within the Sixth Circuit itself. 6 Cir R. 206 © provides that reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of the Court. *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996). In the present case, Petitioner's suggestion of rehearing *en banc* was unsuccessful. The result of the Sixth Circuit's decision in this case is not only a holding contrary to decisions of this Court but also conflict and, hence, confusion within the Sixth Circuit itself. In the within case, the Sixth Circuit failed to follow *Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000) which held that direct evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions. The Sixth Circuit in the instant action also failed to follow

Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999), wherein the Sixth Circuit noted that when a plaintiff comes forth with credible direct evidence of gender discrimination, the burden of persuasion shifts to defendant to show that it would have terminated the plaintiff absent discriminatory motive. Finally, in affirming summary judgment in the fact of the "too macho" comment uttered by the Respondent's High School Principal, the Sixth Circuit's reasoning and holding is contrary to its previous decision in *Weberg v. Franks*, 229 F.3d 514, 526 (6th Cir. 2000) which held that racially discriminatory statements that serve as direct evidence of discrimination create genuine issues of material fact.

Petitioner further contends that the Sixth Circuit decision in this action conflicts with authoritative decisions of other circuits that have addressed the issues of non-applicability of the *McDonnell Douglas/Burdine* framework in cases where direct evidence of discrimination, i.e., comments based on gender based characteristics are involved. *Pivirotto v. Innovative Systems, Inc.*, 191 F.3d 344, 355 (3d Cir. 1999); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001).

Free Speech Claim–public concern issue

Relative to Petitioner's freedom of speech claim, the Sixth Circuit sweepingly concluded without any explanation that reviewing the record in a light most favorable to Petitioner, none of Petitioner's speech addressed a matter of public concern. This Court has held that a government employee retains a First Amendment right to comment on matters of public concern without fear of reprisal from the government as an employer. *Connick v Myers*, 461 U.S.138 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 574

(1968). In *Pickering v. Board of Education, supra*, this Court developed a balancing test which weighed the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. In *Connick v. Myers*, 461 U.S. 138 (1983), this Court incorporated the Pickering test into a two step analysis for determining when the discharge of a public employee violates the First Amendment. The threshold question is whether the employee's speech may be fairly characterized as constituting speech on a matter of public concern. Second, if the speech is found to touch upon a matter of public concern, the court must then apply the Pickering balancing test. If the employee's free speech interests outweigh the efficiency interests of the government as employer, the employee's First Amendment rights have been violated. If the First Amendment violation was a substantial or motivating factor in the termination, the employer must present evidence the employee would have been terminated in the absence of protected conduct. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). In *Connick, supra*, this Court describes speech upon matters of public concern as relating to any matter of political, social, or other concern to the community. Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. *Id* at 146-149. This Court has recognized that the principle of academic freedom emphasizes the essentiality of free public expression of ideas. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). It is submitted that the linchpin of this inquiry–for both public concern and academic freedom–is the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and /or political lives. The Sixth Circuit, construing evidence most

favorably to Petitioner, as it was required to do in a summary judgment setting, should have credited Petitioner's explanation that he uttered the "lips that touch liquor" quote as he always did to students in an effort to instruct students on alcohol issues. Petitioner, at the time a substitute teacher, was on school premises even if not in the classroom. This quotation devoid of the last offensive phrase which Petitioner denied and so informed the Respondent's principal, coupled with the Principal's "too macho" comments directly led to Petitioner's termination. The ability of teachers to instruct, offer guidance, and to discipline clearly involves public concern of the highest degree.

The Sixth Circuit itself in previous cases has stated that to determine whether speech is a matter of public concern, the Court must look at the subject matter of the speech, not the audience for the speech. *Chappel v. Montgomery Fire Prot. Dist. No. 1*, 131 F.3d 564 (6th Cir. 1997). In *Chappel*, the Sixth Circuit considered an instance in which a firefighter had lost his job after speaking privately with several members of the Fire Protection Board regarding what he believed were deficiencies in the fire department. The Court noted that there was nothing in the circumstances of that case that suggested that Chappel's speech on any of the matters discussed was any less a matter of public concern when it was made privately. *Id* at 579. In the instant case, the Sixth Circuit, without meaningful analysis, affirmed the District Court's conclusion that Petitioner's speech did not address a matter of public concern. It is submitted that the District Court gave credence to the student's version of the liquor statement, erroneously so in light of the fact that the case was at the summary judgment stage. The Sixth Circuit ought to have placed this statement, which significantly led to Petitioner's termination, amongst its many other cases in which it found speech touching on a matter of public concern

and in a manner consistent with this Court's previous authority.

CONCLUSION

For reasons set forth in this Petition for Writ of Certiorari, Petitioner Lautermilch respectfully requests that a writ issue as prayed for in order to review the aforedescribed Sixth Circuit Opinion set forth in Appendix.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY & HONOLD, LLP

Francis J. Landry
Counsel for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3502

[Filed February 21, 2003]

JOHN C. LAUTERMILCH, Plaintiff-Appellant,	)
v.	)
FINDLAY CITY SCHOOLS, Defendant-Appellee.	)

JUDGES:
BEFORE SILER and MOORE, Circuit Judges; and MCKINLEY,* District Judge.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote

* Hon. Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3502

[Filed January 3, 2003]

JOHN C. LAUTERMILCH,
Plaintiff-Appellant,

v.

FINDLAY CITY SCHOOLS,
Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Toledo
No. 00-07248
James G. Carr, District Judge

JUDGES:

Before SILER and MOORE, Circuit Judges; McKINLEY, District Judge.* SILER, J., delivered the opinion of the court,

* The Honorable Joseph H. McKinley, Jr., United States District Judge for the Western District of Kentucky, sitting by designation.

in which McKINLEY, D. J., joined. MOORE, J., delivered a separate opinion dissenting in part.

OPINION

SILER, Circuit Judge. Plaintiff John C. Lautermilch appeals the district court's grant of summary judgment to Defendant Findlay City Schools ("the Schools"). For the reasons stated below, we **AFFIRM**.

I.

In 1996, Lautermilch began working as a substitute teacher for the Schools. Like other substitute teachers, Lautermilch did not sign a contract for employment with the Schools.

In 1998, Principal Kathleen Crates and Assistant Principal Michael Kuri decided that Lautermilch would not be called again as a substitute teacher. They had several concerns regarding Lautermilch's behavior as a substitute teacher, including acting inappropriately with young people, tutoring a female student at his home, telling inappropriate jokes in the classroom, and commenting on the size of a female teacher's breasts. In addition, a student had reported Lautermilch as saying to her "Lips who [sic] touch alcohol may not touch mine, but it does not rule out any other part of my body."

Lautermilch states that he did tutor a female student in his home, and that he had made the "lips who touch alcohol" comment without "that vulgar addition to the end of it." Lautermilch states that at a November 1998 meeting, Principal Crates told him that he was "too macho" and that Principal Crates "spit the word macho out as if it was

distasteful." Since then, the Schools have not called Lautermilch to be a substitute teacher.

In 2000, Lautermilch sued the Schools in the Northern District of Ohio, alleging sex discrimination, due process violation, First Amendment violation, and various state law claims. The district court granted the Schools' motion for summary judgment on all claims.

II.

This court reviews a district court's grant of summary judgment *de novo*. *See Smith v. Wal-Mart Stores, Inc.*, 167 F.3d 286, 289 (6th Cir. 1999). Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed.R.Civ.P. 56 (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Under this standard, the court must determine "whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." *Anderson*, 477 U.S. at 252. In making this determination, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255.

Due Process

The Fourteenth Amendment prohibits state actors from depriving an individual of life, liberty, or property without due process of law. Lautermilch argues that the Schools did not afford him due process before depriving him of his property interest in his job as a substitute teacher.

In *Bailey v. Floyd Bd. of Educ.*, 106 F.3d 135 (6th Cir. 1997), this court reviewed the standard for finding a protected property interest in government employment:

> The existence of a property interest depends largely on state law. Government employment amounts to a protected property interest when the employee is entitled to continued employment. Neither mere government employment nor an abstract need or desire for continued employment will give rise to a property interest. Rather, a property interest exists and its boundaries are defined by rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Id. at 141 (internal quotes and citations omitted).

Under Ohio law, substitute teachers have no property interest in their continued employment:

> Teachers may be employed as substitute teachers for terms not to exceed one year for assignment as services are needed to take the place of regular teachers absent on account of illness or on leaves of absence or to fill temporarily positions created by emergencies; such assignment to be subject to termination when such services are no longer needed.

* * *

> Teachers employed as substitutes on a casual or day-to-day basis shall not be entitled to the notice of non-reemployment prescribed in section 3319.11 of the Revised Code . . . .

O.R.C. § 3319.10.

Even without a statutory property interest, Lautermilch could claim a property interest in his employment had such an interest been conferred by contract. *See Bailey*, 106 F.3d at 141. Here, because Lautermilch did not enter into a written contract with the Findlay City Schools, he is an "at will" employee. *See Henkel v. Educ. Research Council of America*, 334 N.E.2d 118, 119, 45 Ohio St. 2d 249 (Ohio 1976) ("The modern rule is that in the absence of facts and circumstances which indicate that the agreement is for a specific term, an employment contract which . . . makes no provision as to the duration of the employment, is not a contract for one year, but is terminable at will by either party.").

The district court correctly found that Lautermilch has not identified sufficient facts and circumstances from which a reasonable jury could find that he was anything other than an "at will" employee.

Sex Discrimination

Lautermilch argues that the district court erroneously analyzed his sex discrimination claims under a Title VII analysis rather than a § 1983 analysis. Although Lautermilch's complaint never mentions Title VII, "[t]o prove

a violation of the equal protection clause under § 1983, [a plaintiff] must prove the same elements as are required to establish a disparate treatment claim under Title VII, i.e., under the *McDonnell Douglas/Burdine* framework." *Jachyra v. City of Southfield*, 97 F.3d 1452, 1996 WL 520795, at *3 (6th Cir. September 12, 1996) (citing *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir. 1988)).

Under the *McDonnell Douglas/Burdine* framework,

> the complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of . . . discrimination. This may be done by showing (i) that he belongs to a [protected] minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

Once a complainant fulfills his initial obligation, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. *Id.* Once the employer articulates some legitimate, nondiscriminatory reason for the action, the complainant has an opportunity to show that the stated reason for rejection was in fact pretext. *Id.* at 804.

Because Lautermilch has not provided any evidence that he was replaced by someone outside his protected class (one way to fulfill the fourth prong of *McDonnell Douglas*), he has failed to establish a *prima facie* case under the four prongs of *McDonnell Douglas*. Alternatively, Lautermilch seeks to establish his *prima facie* sex discrimination case through direct evidence of discrimination. In *Laderach v. U-Haul of Northwestern Ohio,* 207 F.3d 825 (6th Cir. 2000), this court held that a plaintiff may establish a *prima facie* case of sex discrimination through direct evidence of discrimination. *Id.* at 829. Direct evidence is "that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Id.* "Once there is credible direct evidence, the burden of persuasion shifts to the defendant to show that it would have terminated the plaintiff's employment had it not been motivated by discrimination." *Id.* In *Laderach*, the plaintiff presented credible direct evidence of discrimination: the shop foreman testified that on two occasions the defendant told him that he would not promote Laderach because of her sex and that he did not want Laderach to answer hotline telephone calls because "women are not mechanically inclined." *Id.*

Lautermilch attempts to hang his entire *prima facie* case on one offhand comment by Principal Crates (that he was "too macho"). This evidence does not "require[] the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions," and, therefore, he has not established a *prima facie* case under *Laderach*. *Id.* Specifically, when the comment is placed in the context of the termination hearing documenting specific allegations of misconduct, any reasonable trier of fact would conclude that

the comment was critical of Lautermilch's behavior, not his sex or gender.

Even if Lautermilch had established a prima facie case of sex discrimination, the Schools would be entitled to summary judgment. The Schools have articulated a legitimate, nondiscriminatory reason for Lautermilch's discharge, and Lautermilch has not provided any significant evidence that the stated reasons for his termination were pretextual.

First Amendment

In determining whether Lautermilch's speech was constitutionally protected, the court must determine whether Lautermilch's speech can be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers*, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Reviewing the record in a light most favorable to Lautermilch, none of Lautermilch's speech addresses a matter of public concern.

AFFIRMED.

DISSENT BY:
KAREN NELSON MOORE (In Part)

DISSENT

KAREN NELSON MOORE, Circuit Judge, dissenting in part. I dissent with respect to the majority's disposition of Lautermilch's equal protection claim because Principal Kathleen Crates's comment that Lautermilch was "too macho," made at the time she informed him of the decision to deny him future opportunities as a substitute teacher, constitutes direct evidence of sex discrimination sufficient to defeat the Schools' motion for summary judgment. The majority improperly upholds the district court's grant of summary judgment, concluding that any reasonable person would determine that Principal Crates's remark was merely "critical of Lautermilch's behavior, not his sex or gender." In rejecting Lautermilch's equal protection claim under § 1983, the majority holds that one "offhand comment" does not "require[] the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." The majority ignores the key facts that the "too macho" comment was made by the decision-maker at the termination hearing.

"[D]irect evidence is that evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." *Laderach v. U-Haul of Northwestern Ohio*, 207 F.3d 825, 829 (6th Cir. 2000) (quotation omitted). When a plaintiff comes forth with credible direct evidence of gender discrimination, "the burden of persuasion shifts to the defendant to show it would have terminated the plaintiff" absent the discriminatory motive. *Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp.*,

176 F.3d 921, 926 (6th Cir. 1999). The majority appears to hold that the "too macho" comment by the decision-maker at the termination hearing does not constitute direct evidence, and even if it were direct evidence the majority concludes that Lautermilch has failed to show pretext. The Supreme Court, however, has made it abundantly clear that the *McDonnell Douglas* test does not apply where the plaintiff presents direct evidence of discrimination. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985). This is so because "the shifting burdens of proof set forth in *McDonnell Douglas* are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.'" *Id.* (citation omitted).

The Equal Protection Clause prohibits discrimination on the basis of gender -- which includes discrimination against males. *See generally Craig v. Boren*, 429 U.S. 190, 197-98, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976) (applying intermediate scrutiny to statute discriminating against males). According to the Oxford English Dictionary, the word "macho" has its origins in the Spanish language and is defined as "a man; [specifically] a 'tough guy.'" 9 Oxford English Dictionary 160 (2d ed. 1989).[1] In direct contrast to the

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[1] The definition continues: "also, manliness, virility; an impression of this." 9 Oxford English Dictionary 160 (2d ed. 1989). The adjective use of "macho" is defined as "ostentatiously or notably manly or virile." *Id.*; *see also* Merriam Webster Online, *at* http://www.m-w.com/home.htm (last visited Dec. 17, 2002) ("macho" defined as "aggressively virile"). Further definitions of "macho" include: "assertive or aggressive manliness" and "an assertively virile, dominating, or domineering male." Random House Unabridged Dictionary 1152 (2d ed. 1993).

majority, I contend that it is precisely because the gender-based comment was made by the ultimate decision-maker "in the context of a termination hearing," that one reasonably can infer that gender was a motivating factor in Principal Crates's decision. Moreover, the commonplace usage of the word "macho" refers exclusively to behaviors or qualities associated with the male gender. Both the nature of the comment and the manner in which it was delivered suggest that summary judgment was improper because a reasonable juror could find by a preponderance of the evidence that Lautermilch's gender "was at least a motivating factor in the employer's actions." *Laderach*, 207 F.3d at 829.

Suppose Principal Crates had said to an African-American substitute teacher that the Schools were unable to utilize his services because he was "too black," or that she had failed to employ a particular female teacher because she was "too feminine." Under these circumstances it is relatively clear that the majority would have reached a different result. *See generally Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989) (permitting a woman to prove that her gender played a part in an adverse employment decision through statements including that she was not "feminine" enough to become a partner and that she was "macho"); *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344, 355 (3d Cir. 1999) (noting that Title VII plaintiffs should not have to prove that they were replaced by someone outside their class because sex discrimination nonetheless can exist when an employer favors some gender-based characteristics within a sex over others); *Nichols v. Azteca Rest. Enters.*, Inc., 256 F.3d 864, 874 (9th Cir. 2001) (applying *Price Waterhouse* to a situation where a man is accused of behaving too femininely). The Principal's word choice, telling

Lautermilch that he would not be rehired as a substitute teacher because he was "too macho," as opposed to telling him he was "too male," should not be the basis for a different finding. Moreover, the fact that Lautermilch was punished for exhibiting an ordinarily favored gender stereotype, maleness, should not distinguish this case from one where the punishment is for failing to live up to an accepted gender role. *Cf. Pivirotto*, 191 F.3d at 355 (including within the definition of discrimination situations where "an employer may act on gender-based stereotypes, firing women it perceives as not feminine enough (or as too feminine), or discharging women who are too aggressive while not doing the same to male employees").

Both *Price Waterhouse* and the current situation involve employees accused of behaving "too manly" – in the former case a female plaintiff was told to act more like a woman and in the instant case a male plaintiff was told to act less like a man. *See Price Waterhouse*, 490 U.S. at 235. This is directly analogous to a situation where a woman and a man are both discriminated against for behaving too femininely. *See Nichols*, 256 F.3d at 874. The only marked difference is that in *Price Waterhouse* and *Nichols* the plaintiffs are not conforming to gender stereotypes, whereas in the current situation Lautermilch is allegedly exhibiting too much of the male gender stereotype when his behavior is described as "too macho." Because I believe it is inconsistent to protect a woman from discrimination on the basis that she is not acting "like a woman" or conversely acts "too much like a woman," while failing to protect a man accused of acting "too manly," I respectfully dissent. Under either scenario the plaintiff is suffering sex discrimination by the application of harmful gender stereotypes.

When a plaintiff comes forth with direct evidence of gender discrimination, the defendant has the burden of persuasion to show that it would have terminated the plaintiff absent the discriminatory motive. *Jacklyn*, 176 F.3d at 926. In the instant direct evidence case, questions of fact remain. *See, e.g.*, *Weberg v. Franks*, 229 F.3d 514, 526 (6th Cir. 2000) (holding that racially discriminatory statements that serve as direct evidence of discrimination create genuine issues of material fact). I do not contest that the Schools certainly have produced some evidence of Lautermilch's impropriety with the students. Nonetheless, a quintessential fact question remains regarding what actually motivated Principal Crates in her decision to terminate Lautermilch. This question is one for the trier of fact to resolve, not for the court on a motion for summary judgment.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 01-3502

[Filed January 3, 2003]

JOHN C. LAUTERMILCH, Plaintiff-Appellant,	)
v.	)
FINDLAY CITY SCHOOLS, Defendant-Appellee.	)

Before: SILER and MOORE, Circuit Judges; McKINLEY, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Toledo

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Leonard Green, Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OHIO WESTERN DIVISION

3:00cv7248

[Filed April 9, 2001]

JOHN C. LAUTERMILCH,
Plaintiff,
v.

FINDLAY CITY SCHOOLS,
Defendants.

JUDGES:
James G. Carr, United States District Judge.

ORDER

I. STATEMENT OF THE CASE

This is an employment discrimination case in which plaintiff, John C. Lautermilch, alleges that defendant Findlay City Schools violated his rights under 42 U.S.C. § 1983, and the First, Fifth, and Fourteenth Amendment because defendant's decision not to rehire plaintiff constituted reverse gender discrimination, violated his right to free speech, and deprived him of a property interest. Jurisdiction arises under

28 U.S.C. § 1331. Pending is defendant's motion for summary judgment. (Doc. 17). For the following reasons, defendant's motion shall be granted.

II. STATEMENT OF FACTS

Plaintiff worked as a substitute teacher for defendant from February, 1996 through November, 1998. (Doc. 20 at 12, 39). Plaintiff did not sign a contract for employment with defendant. (Doc. 20 at 29). Defendant asserts and plaintiff denies that plaintiff knew that the defendant had the right to stop calling plaintiff to work at any time. (Doc. 18 at 27-28).

Plaintiff was familiar with a Findlay City Schools document entitled "Guidelines for Substitute Teaching Service" which contains the statement: "The conduct of the teacher should conform to the accepted patterns of behavior of the most desirable members of the community." (Doc. 17 at 3; Doc 18, Exhibit F).

Defendant alleges that, in November, 1998, the defendant became aware that a female student had quoted plaintiff as saying, "Lips who [sic] touch alcohol may not touch mine, but it doesn't rule out other parts of my body." (Doc. 20 at 17-20; Doc 19 at 10-16). The student who reported the statement was asked to put it in writing and two other students verified the statement in part. (Crates Affidavit P 11; Doc. 18, Exhibit G; Doc 20 at 17). Plaintiff denies making this statement. (Doc. 22 at 4).

Upon learning of the allegation, Principal Crates and Assistant Principal Kuri decided that plaintiff would not be called again as a substitute teacher until he met with Crates.

(Doc. 17 at 5). On November 17, 1998, Kuri left a voice mail message informing plaintiff that he needed to meet Kuri and Crates before he was called to work again. (Doc. 20 at 21-27; Doc. 18 at 39).

Prior to the November, 1998 incident, Principal Crates had been told about several incidents involving the plaintiff. First, Crates was informed that a parent of a handicapped student did not want her child in class with plaintiff because of his reputation in the neighborhood for acting inappropriately with some children. (Doc. 20 at 15-16; 32). Second, Crates was advised that plaintiff had befriended a female high school student who was thought to be an "at risk" student. (Doc. 17 at 4). On at least two occasions, plaintiff tutored that student at his home unsupervised. (Doc. 18 at 33; Doc 20 at 24). Third, Crates became aware of reports that other teachers were upset with plaintiff for "high fiving" students in the hall and telling inappropriate jokes in the classroom. (Crates Affidavit, P 8). Finally, Crates was informed that plaintiff had commented on the size of a female teacher's breasts. (Crates Affidavit, P 9; Doc. 19 at 11-12).

Plaintiff denies engaging in any of the activities alleged by the defendant. (Doc. 18 at 33-35). However, in plaintiff's deposition, plaintiff admits that he tutored a female student at his home after school. (Doc. 18 at 33).

On November 20, 1998, Crates, Kuri, and plaintiff held a meeting to discuss the November, 1998 incident. (Doc. 17 at 5; Doc. 22 at 4). At the meeting, plaintiff repeatedly asked for examples and denied all the allegations. (Doc 22 at 4). Crates told plaintiff that she was concerned about a pattern

of behavior and that she did not feel comfortable having plaintiff serve as a substitute teacher. (Doc. 20 at 5).

The parties disagree as to what happened next. Plaintiff asserts that Crates told him that she would look into the situation and that it would take some time, but that plaintiff would hear back probably by the end of November. (Doc. 18 at 45-6). Plaintiff further asserts that he was never advised at the meeting that if he disagreed with her decision that he had the right to talk to Dr. Ashtoreth about the situation. (Doc. 18 at 48.).

Defendant alleges that plaintiff was told that "If Dr. Ashworth is comfortable with you in the classroom, then I am." (Doc. 19 at 20-21; Doc. 20 at 28). Plaintiff never spoke to Dr. Ashworth. (Doc. 17 at 6).

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The moving party always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact. *Id.* at 323. The burden then shifts to the nonmoving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986) (quoting Fed. R. Civ. P. 56(e)).

Once the burden of production shifts, the party opposing summary judgment cannot rest on its pleading or merely reassert its previous allegations. It is insufficient "simply [to] show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Rather, Rule 56(e) "requires the nonmoving party to go beyond the [unverified] pleadings" and present some type of evidentiary material in support of its position. Celotex, 477 U.S. at 324. Summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

B. Deprivation of Property Interest in Continued Employment

Plaintiff alleges that by refusing to have him as a substitute teacher, defendant deprived him of a property interest without due process of law, in violation of 42 U.S.C. § 1983.

To prevail, Lautermilch must first establish that he has a protected property interest in his continued employment at Findlay High School. Public employees with a protected property interest are "entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present [their] side of the

story." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985); *see also Goss v. Lopez*, 419 U.S. 565, 42 L. Ed. 2d 725, 95 S. Ct. 729 (1975). Absent a property interest, plaintiff is not entitled to any pre-deprivation process. *Williams v. Commonwealth of Kentucky*, 24 F.3d 1526 (6th Cir. 1994). "To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 546.

"Government employment amounts to a protected property interest when the employee is 'entitled' to continued employment." *Bailey v. Floyd Bd. of Educ.*, 106 F.3d 135, 141 (1997); (citing *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972)). Neither mere government employment nor an abstract need or desire for continued employment will give rise to a property interest. *Roth*, 408 U.S. at 577. Rather, a property interest exists and its boundaries are defined by "rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577.

To establish a protected property interest in his continued employment, plaintiff must be able "to point to some statutory or contractual right conferred by the state which supports a legitimate claim to continued employment." *Bailey* 106 F.3d at 141.

With respect to a contractual right, plaintiff was employed without a contract and therefore an "at will"

employee. *see Henkel v. Educational Research Council*, 45 Ohio St. 2d 249, 344 N.E.2d 118 (1976). Plaintiff asserts that the Board's habitual renewal of the annual list of substitute teachers created a protected property interest in the expectation of continued employment. I disagree. The mere fact that the defendant's past hiring methods would have included the plaintiff is insufficient to confer a protected property interest based on the possibility of those methods being used in the future.

Plaintiff additionally asserts that a property interest is created by the language contained in the Guidelines for Substitute Teaching Service in Findlay City Schools which provides, "if a substitute teacher accepts most or all requests, his/her chances of working more will be greatly increased." The language of the handbook does not entitle a substitute teacher to continued employment. It merely sets forth one of the many factors considered when dealing with substitute teachers.

With respect to the statutory right, plaintiff asserts that as a long-term substitute, he was, under Ohio Revised Code § 3319.11, entitled to notice that he was no longer going to be employed by Findlay High School. I disagree. "Teachers employed as substitutes on a casual or day-to-day basis shall not be entitled to the notice of non re-employment prescribed in § 3319.11 of the Revised Code." O.R.C. § 3319.10 (2000). Section 3319.11 requires that notice of nonrenewal be given where a teacher is a long-term substitute. *State ex rel. Dennis v. Hillsdale Local School Dist.*, 28 Ohio St. 3d 263, 503 N.E.2d 748, 28 Ohio B. Rep. 341 (1986).

In light of the fact that plaintiff's classroom assignments could vary day-by-day, he was not assigned to replace specific individuals for a clearly defined amount of time, and his pay was calculated on a daily basis, rather than according to the regular teacher's pay schedule, I find that plaintiff was a casual substitute. *Id.* (Holding that plaintiff was considered a long-term substitute because he was assigned to the same classroom for long periods of time and was paid according to the regular teacher's pay schedule.) Plaintiff is therefore not entitled to notice of his nonrenewal.

Additionally, plaintiff contends that defendant has the burden of showing that his services were no longer needed prior to his nonrenewal. I disagree. O.R.C. § 3319.10 provides that "substitute teachers may be employed for terms not to exceed one year" and that such assignment is "subject to termination when such services are no longer needed." Plaintiff is an at-will employee and can be terminated with or without cause. Therefore, § 3319.10 neither precludes defendant's decision not to call plaintiff nor bestows a protectable property interest on the plaintiff. Consequently, defendant is entitled to summary judgment because plaintiff has failed to establish that he has a protected property interest.

B. Freedom of Association Claim

Plaintiff claims that his right of freedom of association was violated when defendant terminated him for associating with students outside the classroom. Specifically, plaintiff claims that defendant refused to call him because plaintiff had tutored, unsupervised, an "at risk" student at his home. I disagree.

The Supreme Court has developed two lines of cases to address the First Amendment rights of public employees. *McEvoy v. Spencer*, 124 F.3d 92, 97-100 (2nd Cir. 1997). The first line addresses when the government can take adverse action against an employee because of his political affiliation. *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990); *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980). The second line involves government employees who claim to be victims of retaliation taken against them as reprisals for their having spoken out on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).

When a public employee speaks as "an employee upon matters only of personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. . . ." *Id.* at 147-48. The court must look at "the content, form, and context of a given statement" to determine whether an employee's speech addresses a matter of public concern. *Id.* at 147-48.

The government has broader powers to limit speech when it is acting as an employer rather than as the sovereign. *Waters v. Churchill*, 511 U.S. 661, 671-72, 689, 128 L. Ed. 2d 686, 114 S. Ct. 1878 (1994) (plurality opinion). The government should be given "wide discretion and control to manage its own internal affairs and personnel." *Connick*, 461 U.S. at 151. The Sixth Circuit courts has held that the Connick applies to claims of both freedom of speech and freedom of association. *Boals v. Gray*, 775 F.2d 686, 692 (6th Cir. 1985).

Plaintiff's interaction with students outside the classroom is not a matter of public concern. The defendant has a great deal of discretion when regulating a teacher's ability to meet with students outside the classroom. Therefore, defendant is entitled to summary judgment because plaintiff has failed to state a claim for which relief can be granted.

C. Freedom of Speech Claim

Next, plaintiff argues that the alleged "Lips that touch . . ." comment and his comment on the size of a female teacher's breasts are protected forms of speech for which plaintiff cannot be discharged. In Ohio, courts have tested First Amendment violations using the two-stage inquiry set forth in *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). *Bailey*, 106 F.3d at 144. Pursuant to this test, the employee must first establish that his speech was constitutionally protected. *Doyle*, 429 U.S. at 287; *Langford v. Lane*, 921 F.2d 677, 680 (6th Cir. 1991). Speech is protected when it "addresses a matter of public concern, and the employee's interest in making such statements outweighs the 'interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Bailey*, 106 F.3d at 144; (citing *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)).

Second, plaintiff must establish that the speech was a "'substantial' factor -- a 'motivating' factor -- in the employer's decision to terminate his or her employment." *Bailey*, 106 F.3d at 144.

The second part of the *Mount Healthy* test "requires the employee to show that he or she was discharged due to speech addressing a matter of public concern." *Bailey*, 106 F.3d at 144; (citing *Rankin v. McPherson*, 483 U.S. 378, 97 L. Ed. 2d 315, 107 S. Ct. 2891 (1987)). The plaintiff must point to "'specific, nonconclusory allegations' reasonably linking his speech to employer discipline." *Bailey*, 106 F.3d at 144 (citations omitted). "When opposing a motion for summary judgment, the nonmoving party may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent." *Collyer v. Darling*, 98 F.3d 211, 229; (citing *Wright v. Illinois Dep't of Children & Family Servs.*, 40 F.3d 1492, 1500).

Plaintiff argues that the comments he allegedly made were done in connection with classroom instruction and therefore matters of public concern. Even looking at the evidence in the light most favorable to the plaintiff, his alleged comments do not speak to matters of public concern. Therefore, plaintiff's alleged statements do not fall within the protection of the First Amendment. Consequently, plaintiff has failed to provide a prima facie case of a First Amendment violation, and defendant's motion for summary judgment shall be granted.

D. Federal Claim for Gender Discrimination

Plaintiff contends that Crates statement that plaintiff was "too macho" coupled with his termination constituted reverse gender discrimination in violation of Title VII.

Intentional discrimination may be established with direct evidence of discrimination, or by circumstantial

evidence to create an inference of discrimination. *See Talley v. Bravo Pitino Restaurant*, 61 F.3d 1241, 1246 (6th Cir. 1995). Because, plaintiff fails to show any direct evidence of discrimination, plaintiff's claim will be analyzed under the McDonnell - Douglas burden shifting approach to circumstantial evidence. *McDonnell - Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).

A plaintiff bringing a sex discrimination claim carries the initial burden of proving by a preponderance of the evidence a prima facie case. Plaintiff must provide evidence that: 1) he was a member of a protected class; 2) he was subjected to adverse employment action; 3) he was qualified for the position; and 4) he was replaced by a person outside the protected class. McDonnell - Douglass, 411 U.S. at 802.

Proof of all four criteria raises a presumption of sex discrimination. If plaintiff succeeds in proving his prima facie case, the burden then shifts to the employer to "articulate some legitimate nondiscriminatory reason for the employee's [discharge]." *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1159-60 (6th Cir. 1990) (*citing McDonnell - Douglass*, 411 U.S. at 802). If the employer sets forth a nondiscriminatory reason, the plaintiff must prove by a preponderance of the evidence "that the legitimate reasons offered by the [employer] were not its true reasons, but were a pretext for discrimination." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

Plaintiff, as a male, is a member of a protected class. Plaintiff suffered an adverse employment action by

defendant's refusal to continue using him as a substitute teacher. Plaintiff is qualified for the position of substitute teacher as evidenced by his credentials.

However, defendant argues, and I agree, that plaintiff fails to offer any evidence: 1) that he was replaced by someone outside his protected class; 2) that defendant has no articulated legitimate, and non-discriminatory reason for terminating plaintiff; or 3) that defendants articulated reasons are merely a pretext for discrimination.

Furthermore, an isolated comment that plaintiff was "too macho" is not a sufficient basis for attributing discriminatory animus to the defendant. *Faragher v. City of Boca Raton*, 524 U.S. 775, 786, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998) ("Simple 'teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"). Plaintiff has failed to establish his prima facie case, therefore, defendant is entitled to summary judgment.

D. Other State Claims

Because defendant's summary judgment motion for plaintiff's federal law claim has been granted, plaintiff's remaining state law claims are dismissed without prejudice. See *Taylor v. First of Am. Bank-Wayne*, 973 F.2d 1284 (6th Cir. 1992) (holding that district court did not abuse its discretion by refusing to exercise jurisdiction over plaintiff's state law claim).

IV. Conclusion

It is, therefore,

ORDERED THAT

Defendant's motion for summary judgment is granted.

/s/ James G. Carr
James G. Carr
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OHIO
WESTERN DIVISION

3:00cv7248
[Filed April 9, 2003]

JOHN C. LAUTERMILCH,	)
Plaintiff(s),	)
v.	)
	)
FINDLAY CITY SCHOOLS,	)
Defendant(s).	)
	)

JUDGMENT ENTRY

For the reasons stated in the ORDER filed on April 9, 2001

IT IS HEREBY ORDERED, ADJUDGED and DECREED that

1. The defendant's Motion for Summary Judgment is granted.
2. Case closed.

/s/ James G. Carr
James G. Carr
United States District Judge

APPENDIX F

42 U.S.C. Section 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(2)

No. 02-1619

Supreme Court, U.S.
FILED
JUN 6 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

JOHN C. LAUTERMILCH,

Petitioner,

v.

FINDLAY CITY SCHOOLS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF FACTS

In February, 1996, Petitioner Lautermilch began working sporadically as a substitute teacher at Respondent Findlay City Schools. He was never promised that he would be called for any particular number of assignments as a substitute teacher. Neither Lautermilch nor any other substitute teacher signs a contract with Findlay City Schools. Lautermilch was familiar with a Findlay City Schools' document entitled "Guidelines for Substitute Teaching Service" which governed his position as a substitute teacher. The Guidelines set forth a Code of Ethics for Substitute Teachers which includes the statement: "The conduct of the teacher should conform to the accepted patterns of behavior of the most desirable members of the community."

Lautermilch functioned as a substitute teacher in the Findlay City Schools from February 1996 through November 1998. He substituted for all classes and grades in the middle and high school. During that 2½ year period, Findlay City Schools had some concerns about some of Lautermilch's activities. Kathleen Crates, Principal of Findlay High School, had heard that a parent of a handicapped student didn't want her child in class with Lautermilch because of Lautermilch's reputation in the neighborhood of acting inappropriately with some children. Although Crates did not believe the criticism at the time, she certainly remembered it as other issues arose. Crates later was advised that Lautermilch had befriended a female high school student who by all reports was an "at risk" student. Lautermilch on at least two occasions tutored that student at his home after school with no one else present. Crates also became aware of reports that other teachers were upset with Lautermilch for "high-fiving"

students in the hall and there were reports of Lautermilch telling inappropriate jokes in the classroom. At one point it was reported that Lautermilch had commented on the size of a female teacher's breasts.

In November, 1998, the administration at Findlay City Schools became aware that a student had quoted Lautermilch as saying the following:

> Lips who [sic] touch alcohol may not touch mine, but it does not rule out any other part of my body.

The student who reported the statement was asked to put it in writing and two other students verified the statement, at least in part.

Upon learning of the allegation, Principal Crates and Assistant Principal Michael Kuri decided that Lautermilch would not be called for any further substitute jobs until he met with Crates. Kuri left a message on Lautermilch's answering machine telling him that he should not report to school until he met with Crates.

A couple of days later, Crates, Kuri, and Lautermilch met for the specific purpose of discussing the alleged "lips that touch alcohol . . . " comment. However, the other alleged incidents were also discussed. At that meeting, Crates felt, and told Lautermilch, that there was a pattern of behavior which she was concerned about and that she didn't feel comfortable having Lautermilch serve as a substitute teacher. Lautermilch alleges that Crates told him that he was "too macho." Lautermilch was told this decision could be overruled by Dr. Mary Anne Ashworth, the Assistant Superintendent, and Lautermilch was invited to speak to Dr. Ashworth if he so desired.

Lautermilch never spoke to Dr. Ashworth nor has he taken any other action to seek to be reinstated to the substitute teaching list other than filing this lawsuit.

REASON FOR DENYING THE WRIT

Lautermilch Has Presented No Evidence Of Reverse Gender Discrimination

Lautermilch contends that he is entitled to a jury trial on his reverse gender discrimination claim based **solely** on the alleged comment that he was "too macho." Lautermilch has presented no other evidence of discrimination and acknowledges that he cannot present a *prima facie* discrimination claim under the *McDonnell Douglas/Burdine* framework. Lautermilch's claim fails for several reasons.

First, the alleged "too macho" comment is not evidence of gender discrimination, rather, it describes inappropriate behavior. Indeed, Lautermilch, Findlay City Schools, and the majority and dissenting opinions of the Court of Appeals agree that "too macho" describes behavior. (Petition, p. 12; Appendix B, pp. 9a-10a, 13a). As noted in the dissenting opinion, "macho" is defined as "tough guy," "aggressively virile," "assertive or aggressive manliness," and "an assertively virile, dominating, or domineering male." (Appendix B, p. 12a). However, the dissent and Lautermilch make an illogical leap that this is direct evidence of gender discrimination because these are " . . . **behaviors** and **qualities** associated with the male gender." (emphasis added) (Appendix B, p. 13a) and then infer that Findlay City Schools were discriminating against Lautermilch because he is male.

This analysis has two fundamental problems. First, "macho" is not used to exclusively describe males. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L. Ed. 268 (1989) (among other stronger evidence of stereotyping, a female is described as "macho"). Additionally, while this behavior may be generally associated with males, it does not follow that "macho" is synonymous with "male." All males are not "macho." Indeed, only a small subset of males are usually described as "macho."

Second, "macho" refers to aggressive, assertive, or domineering behavior, which is generally inappropriate behavior and certainly inappropriate behavior in a public school. However, the analysis urged by Lautermilch ignores the substance of the behavior and would protect this inappropriate behavior simply because it is associated with a gender. This conclusion would be the first step to reviving the universally discredited "boys will be boys" defense to sexual harassment claims or, at a minimum, present employees with a dilemma of how to confront "macho" behavior in the workplace. Taking this theory to an extreme, an employee could maintain a reverse gender discrimination claim for being fired because he is a rapist since rape is "behavior . . . associated with the male gender."

In short, the Sixth Circuit Court of Appeals is correct: "Too macho" describes inappropriate behavior which is not protected merely because it is associated with one gender. The actions taken by Findlay City Schools were based upon Lautermilch's behavior, not his gender, and summary judgment was proper.

Findlay City Schools are also entitled to judgment as a matter of law because "too macho" is insufficient to meet the direct evidence standard. The direct evidence standard

requires that a " . . . plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 276; 109 S.Ct. 1775, 1804; 104 L. Ed. 2d 268, 304 (1989). "Direct evidence is evidence which, if believed, proves the fact without inference or presumption." *Brown v. East Mississippi Electric Power Assn.*, 989 F.2d 858, 861 (5th Cir. 1993); *Accord Carter v. Three Springs Residential Treatment*, 132 F.3d 635, 641 (11th Cir. 1998). A comment which requires an inference to establish an illegal motive is not direct evidence. *Erickson v. Farmland Industries, Inc.*, 271 F.3d 718 (8th Cir. 2001). Ambiguous statements which can be interpreted as either evidence of a discriminatory motive or a benign comment are not direct evidence. *Fernandes v. Costa Brothers Masonry*, 199 F.3d 572, 583 (1st Cir. 1999). Direct evidence requires statements that provide a "high degree of assurance" that a termination was attributable to discrimination. *Id.* at 583; *Patten v. Wal-Mart Stores East*, 300 F.3d 21, 25 (1st Cir. 2002).

In *Fernandes v. Costa Brothers Masonry, Inc., supra*, the direct evidence relied upon were two statements: "I don't need minorities, and I don't need residents on this job" and "I don't have to hire you locals or Cape Verdean people." *Id.* at 583. The First Circuit Court of Appeals, after a thorough analysis of direct evidence standards, held these statements did not constitute sufficient direct evidence to avoid summary judgment because they were inherently ambiguous statements and could be interpreted in two different ways, one discriminatory and the other benign. *Id.* at 581-584. This analysis requiring direct evidence to be not "inherently ambiguous" was reiterated in *Patten v. Wal-Mart Stores East, supra*.

The alleged "too macho" comment made in connection with a discussion about Lautermilch's inappropriate and boorish behavior does not constitute direct evidence as a matter of law. "Too macho" describes Lautermilch's inappropriate behavior which was discussed with Lautermilch at his meeting with Crates and Kuri. At that meeting, Crates and Kuri discussed with Lautermilch complaints about his "lips shall not" quote, Lautermilch telling inappropriate jokes, other teachers being upset with Lautermilch, Lautermilch "high-fiving" other students, tutoring a female "at risk" student at his home after school with no one else present, and Lautermilch's comment on the size of a female teacher's breasts. Given the undisputed specific incidents discussed at the meeting, the "too macho" quote clearly does not provide direct evidence of discrimination because of his gender. Rather, "too macho" describes certain inappropriate behavior.

The "too macho" comment, when viewed in context of all other undisputed facts, was, at best, ambiguous and clearly does not meet the direct evidence standard. No reasonable jury, given the specific complaints discussed with Lautermilch, could conclude that Lautermilch was discriminated against because of his gender based solely on the alleged "too macho" comment.

Findlay City Schools' Action Did Not Violate Lautermilch's First Amendment Rights

Lautermilch contends that Findlay City Schools violated his First Amendment rights of free speech. As Lautermilch correctly notes, the initial issue is whether the speech is a matter of public concern. Accordingly, the issue is whether Lautermilch's "Lips who [sic] touch

alcohol may not touch mine, but it does not rule out any other part of my body" statement is a matter of public concern. This speech is simply not a matter of public concern, except possible public concern over Lautermilch's judgment or failure of Findlay City Schools to address Lautermilch's inappropriate speech.

The United States Supreme Court holding in *Connick v. Myers*, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L. Ed. 2d 708 (1983) is dispositive:

> . . . When employee expression cannot be fairly considered as relating to any matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversights by the judiciary in the name of the First Amendment. Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violates no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for dismissal are alleged to be mistaken or unreasonable.

Accordingly, Lautermilch's First Amendment claim was properly dismissed by the District Court and Court of Appeals.

CONCLUSION

Respondent Findlay City Schools requests that Petitioner John C. Lautermilch's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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